IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

STEVEN MICHAEL WEEMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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STATEMENT OF THE QUESTION

I.

That a person's right to carry a firearm was restored is an affirmative burden-shifting defense in a felon-in-possession of a firearm case in Michigan. The trial court directed a verdict of acquittal, mistakenly finding that lack of restoration was an element of the offense. Where jeopardy is terminated on defense request on a misunderstanding of the law as to the elements of the offense and not because of a finding, "correct or not," of insufficient proof on one of the elements, does United States v. Martin Linen Supply Co, 430 US 564 (1977) compel the result that double jeopardy bars retrial, and if so, should that opinion be revisited?

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NOW COMES the State of Michigan, by **KYM L WORTHY**, *Prosecuting Attorney for the County of Wayne*, and **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this cause on September 23, 2004, leave denied by the Michigan Supreme Court on September 28, 2005.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unpublished, and appears as Appendix A. The order of the Michigan Supreme Court denying leave to appeal appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Respondent was charged with assault with intent to murder, being a felon in possession of a firearm, and felony-firearm. At trial Ms. Lisa Westwood, a department supervisor with the Department of Corrections, testified that on docket no. 91-1259 defendant was sentenced on March 6, 1991, to a term of 4-20 years for delivery of cocaine under 50 grams. He was paroled on October 10, 1994, and discharged from parole on October 12, 1996. R, 2-12, 8-9.

No proof that defendant's rights to carry a firearm were restored was offered by the defense. When jury instructions were discussed, the trial judge indicated that under the standard jury instruction the "fourth element" of the offense of felon in possession is that "defendant's right to possess has not been restored pursuant to Michigan law." R, 2-12, 68. The prosecutor indicated that restoration is an affirmative defense, requiring the defendant to come forward with proof of restoration before the prosecution had the burden of persuasion on the point. R, 2-12, 68-75. Defense counsel argued the prosecution had not "proved the elements of this crime which is that this defendant was ineligible to carry a firearm." R, 2-12, 71. The trial court purported to grant a directed verdict because the prosecution had not proven that defendant's "right to possess a firearm has not been restored pursuant to Michigan law." R, 2-12, 75. An order was entered to that effect. Petitioner appealed. The Michigan Court of Appeals affirmed on the basis that

> A trial court's ruling constitutes an acquittal for double jeopardy purposes if the ruling, regardless of the label given to it, represents a "'resolution, correct or not, of some or all of the factual elements of the offense charged.'" *People v Nix*, 453 Mich 619, 627; 556 NW2d 866 (1996), quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). The phrase

"correct or not" refers to 'all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong *with respect to whether a particular factor is an element of the charged offense.*'"

Slip opinion, at 2; see appendix A..

Petitioner's application for leave to appeal was denied by the Michigan Supreme Court on September 28, 2005. Appendix B.

Reasons for Granting the Writ

A. Introduction

One thing is clear in this case: no defense wish to have this case determined by the jury was thwarted, the defense seeking—successfully—to avoid a jury resolution of the case by having the trial judge take it from the jury. The case involves no attempt to harass the respondent through repeated prosecutions, as all the petitioner seeks is one full and fair opportunity to have the case decided by a jury.

One convicted of certain specified felonies in Michigan may not again carry a firearm unless and until certain conditions are met, one being that the local gun board must restore that person's right to carry a firearm. See MCL 750.224f(2). The restoration provisions of the statute constitute an affirmative burden-shifting defense, "lack of restoration" not being an element of the offense the prosecution must prove:

> Defendant here produced no evidence to establish that his right to possess a firearm had been restored. Because defendant failed to meet his burden of production, the prosecution was not required to prove the lack of restoration of firearm rights beyond a reasonable doubt.
>
> *People v. Perkins*, 473 Mich 626 (2005)

The trial of this matter was aborted, then, on defense request, on the conclusion of the trial judge that the prosecution had not presented evidence as to a matter that is not an element of the offense. And yet the Michigan Court of Appeals has found retrial precluded by this Court's decision in *Martin Linen Supply*, reading this Court's statement that an acquittal for purposes of double jeopardy is "a resolution,

correct or not, of some or all of the *factual elements* of the offense charged" to include the "factual" decision of "whether a particular factor is an element of the charged offense." But whether something is an element or an affirmative defense is not a "factual matter"; rather, it is a question of law. Where determined incorrectly, and the trial aborted on that basis, the trial has been aborted not on the basis of a "judicial acquittal," barring retrial, but on an error of law. This is a recurring misconstruction of this Court's opinion in *Martin Linen Supply* needing correction by this Court; if not a misconstruction, then *Martin Linen Supply* should be revisited.

B. The Prohibition On Retrial After Acquittal: "A Resolution, Correct or Not, Of Some or All of the Factual Elements of the Offense"

Given that the Fifth Amendment to the federal constitution provides, in terms that admit of no exceptions, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...," the question arises as to the justification for *ever* allowing retrials for any reason. The answers must be found in history, logic, and sound policy, for as Justice Holmes, writing for the Court in *Gompers v United States*, 233 US 604 (1914) observed long ago, "the provisions of the Constitution are not mathematical formulas...; they are organic, living institutions transplanted from English soil....(whose significance and scope must be determined) not by simply taking the words and a dictionary, but by considering their origin and the line of their growth."

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of autrefois acquit and autrefois convict. Blackstone stated that

> ...the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is

> to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once ***fairly*** found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime (emphasis added).
>
> 4 Blackstone's Commentaries 335.

Blackstone also observed that the:

> ...plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime....
>
> 4 Blackstone's Commentaries at 329-331.

These pleas in bar were a reaction to generatic s of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal." See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

This tradition of the pleas in bar of autrefois acquit and autrefois convict, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists, see e.g. the Massachusetts Body of Liberties of 1641. New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No

subject shall be liable to be tried, after an acquittal, for the same crime or offence." N.H. Const, art I, sec. 16 (1784). Courts in other states also recognized this form of plea in bar. See 26 Am Crim L Rev at 1480-1481.

This rich history was thus before the First Congress which proposed the Bill of rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or *one trial* for the same offence...."(emphasis added). 1 Annals of Cong 434. The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial *even where sought by the defendant* on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment jeopardy clause, referring, significantly, to *one jeopardy*, rather than *one trial*.

Thus, our jeopardy clause is an amalgam of common law pleas in bar, which required an actual judgment in a prior proceeding before the bar could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double jeopardy clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him*" (emphasis added). Story, 3 *Commentaries on the Constitution* (1833) sec 1781, p. 659. The historical underpinning of the jeopardy protection, then, with regard to acquittals, is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state

of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v United States*, 355 US 184 (1957).

The development of the modern doctrine of "judicial acquittals" began with *Fong Foo v United States*, 369 US 141 (1962). There a corporation and two of its employees were brought to trial for conspiracy, as well as a substantive offense. After seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all defendants, and a formal judgment of acquittal was entered. The trial judge's action was based on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. This Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the verdict of acquittal was "final and could not be reviewed." In its per curium opinion, which stretches to amount to a page and one half, the Court reached this conclusion without any analysis of whether a "judgment of acquittal" either entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protections of the double jeopardy clause as the scope and purpose of that clause are revealed in history.

Fong Foo was followed and elaborated upon in the seminal case of *United States v Martin Linen Supply*, 430 US 564 (1977), central to the question here. A judgment of acquittal was entered on defense motion after the jury had been discharged because of an inability to agree. Focusing on the jeopardy interest against the prevention of multiple trials, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result

in "another trial." 51 L Ed 2d at 650. Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then defined as "a resolution, correct or not, of some or all of the *factual elements* of the offense charged"(in the context of what might be called a "judicial acquittal" by the entry of a directed verdict of acquittal).

The rationale was similar in *Sanabria v United States*, 437 US 54 (1978). After all sides had rested, the trial judge excluded evidence in the case on the ground that the Government had cited the wrong underlying state statute in its indictment, and in the absence of any other evidence of guilt, then, on defendant's motion, entered a "judgment of acquittal." The Government appealed, pointing out that a technical defect in the indictment was correctable under the Federal Rules of Criminal Procedure. The First Circuit held that the proceedings had terminated on grounds *unrelated* to criminal liability of the defendant; the Supreme Court, while agreeing that a dismissal on grounds unrelated to criminal culpability is not even a "judicial acquittal" under *Martin Linen Supply*, held that what had occurred was not a dismissal, but an evidentiary ruling, followed by a judicial acquittal, which, under *Martin Linen Supply*, "however erroneous, bars further prosecution on any aspect" of the case. While a defendant seeking a midtrial termination of the proceedings on a "legal" ground thus takes "the risk that an appellate court will reverse the trial court," a defendant who seeks a termination of the trial prior to verdict by seeking a "judicial acquittal" does *not* take the risk that an appellate court will reverse the trial court, said the Court.

C. A Termination of The Trial On the Mistaken Ground That A Burden-Shifting Affirmative Defense is An Element Is Not An Acquittal Under Martin Linen Supply.

It makes no constitutional sense to say, as Michigan courts have, that the determination of whether some fact is an element of the offense is a "factual" question, so that the definition of an acquittal in *Martin Linen Supply* that an acquittal is a determination "correct or not" of some or all of the factual elements of the crime is met even where the court aborting the trial is mistaken as to what the elements are. See Appendix A, and *People v Nix*, 453 Mich 619, 628 (1996)(holding that this Court's phrase "correct or not" includes "all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense"). Other courts have escaped this error.

The lead case is *United States v Maker*, 751 F.2d 614 (CA 3, 1984). Pointing to several *post-Martin Linen Supply* decisions (*Carter v. Estelle*, 677 F.2d 427, 452-53 (CA 5, 1982); *United States v. Dahlstrum*, 655 F.2d 971, 974 (CA 9, 1981); *United States v. Moore*, 613 F.2d 1029, 1037 (CA DC,1979); *Sedgwick v. Superior Court for the District of Columbia*, 584 F.2d 1044, 1049 (CA DC, 1978)), the court found that they "generally understood the test to require an acquittal only when, in terminating the proceeding, the trial court actually resolves in favor of the defendant a factual element necessary for a criminal conviction." 751 F.2d at 622. Thus the appeal of the government in the case before it, the court concluded, was "barred only if the district court's legal determination about the elements of a single scheme conviction is correct." 751 F.2d at 623. Because that ruling was incorrect, the government appeal, and retrial, were not precluded by jeopardy.

Similarly, in *State v. Korsen* 69 P.3d 126 (Idaho,2003) the State appealed, and it was alleged that because jeopardy barred a retrial, appeal was not permissible. The court disagreed—citing the test of *Martin Linen Supply* the court found that the lower court "as a result of legal error, determined that the government could not prove a fact that is not necessary to support a conviction," so that what had occu.red was not an acquittal, and appeal was thus not barred. 69 P.3d at136.

On the other hand, in *State v Lynch*, 399 A.2d 629 (NJ, 1979) the New Jersey Supreme Court found that jeopardy barred a retrial even though the trial court had "added" an element to the offense, and found the evidence insufficient on this pseudo-element. See also *State v Portock*, 501 A.2d 551 (NY Super. App. Div., 1985)(finding *Maker* on point, but concluding that in *Lynch* the New Jersey Supreme Court had "parted company" with the *Maker* court's reading of *Martin Linen*).

Martin Linen, then, has caused some vexing problems, being misunderstood by at leasi Michigan and New Jersey. The double jeopardy clause of the federal constitution should mean the same thing throughout the country. This Court should grant certiorari to make clear that an acquittal does not occur when a judge aborts the trial on the ground that the prosecution could not or did not prove a fact that is *not* necessary to support a conviction.

D. A Judicial Acquittal, Sought By The Defendant, Should Be Appealable, and A Retrial Permitted Upon A Finding of Error

But if Michigan has correctly understood *Martin Linen Supply* that case should be revisited, for a directed verdict of acquittal is not a "true" acquittal. Where such a ruling of law is sought by the defendant, who thereby voluntarily relinquishes his or her right to a jury verdict, that

ruling should be reviewable for legal error. If legal error is found, a second trial should be permitted..

As a matter of history, the development of jeopardy principles did not initially include any power of the court to take a case from the jury and enter a verdict of acquittal, as no such authority existed. As that authority developed, initially it was not an authority to take the case from the jury, but rather to *instruct* the jury that its duty was to acquit, the verdict still being delivered by the jury. The jury might disregard such an instruction, and, if it did so, the verdict was subject to reversal–but, of course, on appeal the Government could oppose on the ground that the instruction was unwarranted given the evidence. As the authority to actually direct the jury to a verdict of acquittal evolved to become authority for the court to take the case from the jury before deliberation and verdict, it was characterized as a ruling of *law* that there was no evidence on an element or elements (now, that no reasonable jury could find guilt beyond a reasonable doubt given the proofs). The judge must take the evidence in the light most favorable to the prosecution, taking that evidence as true, and drawing all inferences reasonably inferable in favor of guilt. See "Directions for Directed Verdicts: A Compass for Federal Courts," 55 Minn L Rev 903 (1971); Henderson, "The Background of the Seventh Amendment," 80 Harv L Rev 289 (1966), Westen and Drubel, "Toward A General Theory of Double Jeopardy," 1978 Sup Ct Rev 81 (1978); "Power and duty of court to direct or advise acquittal in criminal case for insufficiency of evidence," 17 ALR 910.

Westen and Drubel, in "Toward A General Theory of Double Jeopardy," take the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by hypothesis, it does not depend on an assessment of credibility

or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a defendant's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be reviewed." Westen and Drubel, at 155.

Petitioner submits that the protections served by the jeopardy clause, as well as the public interest, would be served by a rule that permitted a review of a directed verdict of acquittal for legal error and a second trial if error were found, as there be no harassment of the accused, who *sought* the termination of the trial, and the public interest in the conviction of the guilty would be vindicated.

CONCLUSION

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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Appendix A: Court of Appeals Opinion

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

STEVEN MICHAEL WEEMS,
Defendant-Appellee.

UNPUBLISHED
September 23, 2004
No. 247435
Wayne Circuit Court
No. 02-014465-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's decision granting a directed verdict of acquittal on the charge of felon in possession of a firearm, MCL 750.224f(2). We affirm.

Defendant was charged with assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court granted a directed verdict on the charge of felon in possession of a firearm on the grounds that the prosecution failed to present evidence that (1) less than five years had passed since all fines were paid, all imprisonment was served, and all terms of probation were complete, and (2) defendant's right to carry a firearm had not been restored. The jury acquitted defendant of assault with intent to commit murder, but convicted him of felony firearm.

MCL 750.224f(2) provides that a person convicted of a specified felony[1] may not possess a firearm in Michigan until five years have passed since he paid all fines, served all terms of imprisonment, and successfully completed all conditions

of probation or parole imposed for the offense, and until his right to possess a firearm has been restored pursuant to MCL 28.424.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. An acquittal, including a directed verdict based upon the insufficiency of the evidence, bars retrial even if the legal ruling underlying the acquittal was erroneous. *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997). FN 1 A "specified felony" is defined in MCL 750.224f(6). Defendant's prior conviction of delivery of cocaine qualified as a specified felony. MCL 750.224f(6)(ii).

A trial court's ruling constitutes an acquittal for double jeopardy purposes if the ruling, regardless of the label given to it, represents a "'resolution, correct or not, of some or all of the factual elements of the offense charged.'" *People v Nix*, 453 Mich 619, 627; 556 NW2d 866 (1996), quoting *United States v Martin Linen Supply Co*, 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). The phrase "correct or not" refers to "all aspects of the trial court's ultimate legal decision, including even cases where the trial court is factually wrong with respect to whether a particular factor is an element of the charged offense." *Nix*, *supra* at 628.

We affirm the trial court's grant of a directed verdict on the charge of felon in possession of a firearm. Given the trial court's decision that the prosecution presented insufficient evidence to support the charge of felon in possession of a firearm, the issue of whether in order to establish that offense the prosecution must prove that the defendant's right to carry a firearm has not been restored, or whether the restoration of rights exemption is an exception on which the defendant must present some evidence before the prosecution has any burden, MCL 776.20, need not be resolved in the context of the instant appeal. The trial court concluded that in order to

establish the offense of felon in possession of a firearm, the prosecution was required to show that defendant's right to carry a firearm had not been restored. The trial court evaluated the sufficiency of the evidence and concluded, correctly or not, that the prosecution presented insufficient evidence to support the charge of felon in possession of a firearm because it did not establish that defendant's right to carry a firearm had not been restored. The trial court additionally concluded that the prosecution could not "satisfy element three, that less than five years has passed since all fines were paid, all imprisonment was served, all terms of probation were complete." Pursuant to *Nix*, *supra*, the trial court's grant of a directed verdict on the charge of felon in possession of a firearm was an acquittal for double jeopardy purposes even if the trial court incorrectly regarded the prosecution as being required to prove an element that it was not required to prove. *Id.* at 626-627.

The prosecution's reliance on *Mehall* as support for its assertion that retrial is not barred in this case is misplaced. In that case, the trial court granted the defendant's motion for a directed verdict, concluding that the prosecution had not presented sufficient proof of the elements of the charged offense. The trial court based its decision on its conclusion that the victim's testimony was not credible. The *Mehall* Court held that retrial was not precluded under the circumstances because by concentrating on the victim's testimony and discarding it as unbelievable, the trial court did not rule on the sufficiency of the prosecution's proofs, and thus did not acquit the defendant for double jeopardy purposes. *Id.* at 7. However, the *Mehall* Court emphasized that retrial is precluded if a trial court evaluated the evidence and determined that it was legally insufficient to sustain a conviction. *Id.* at 6. *Mehall* is consistent with *Nix* in this regard. Here, the trial court evaluated the evidence presented by the prosecution in support of the charge of felon in possession of a firearm, and found it legally insufficient. Defendant was acquitted of that charge for double jeopardy

purposes even if the trial court incorrectly concluded that the prosecution was required to prove a factor that was not an element of the offense, i.e., that defendant's right to carry a firearm had not been restored. *Nix*, *supra* at 626-627.

Affirmed.
/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

Appendix B: Order Denying Leave

Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellant,
v.
STEVEN MICHAEL WEEMS, Defendant-Appellee.
SC: 127032
COA: 247435
Wayne CC: 02-014465-01

By order of February 28, 2005, the application for leave to appeal was held in abeyance pending the decision in *People v Perkins* (Docket No. 126727). On order of the Court, the opinion having been issued on July 29, 2005, 473 Mich 626, the application for leave to appeal the September 23, 2004 judgment of the Court of Appeals is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
September 28, 2005 SS